



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION III
1650 Arch Street
Philadelphia, Pennsylvania 19103-2029

MAR 28 2013

Mr. Richard Weeks, Acting Director
Division of Stormwater Management
Virginia Department of Conservation and Recreation
900 East Main Street, 8th Floor
Richmond, Virginia 23219

Re: Specific Objection to Prince William County Phase I Municipal Separate Storm Sewer
System (MS4) Permit VA0088595

Dear ^{Rich} Mr. Weeks:

On February 27, 2013, the U. S. Environmental Protection Agency (EPA or the Agency), received a draft of the above-referenced National Pollutant Discharge Elimination System (NPDES) permit (Prince William County permit), with a revised draft submitted March 19, 2013. EPA has reviewed this permit pursuant to 40 C.F.R. § 123.44 and the Memorandum of Agreement (MOA) between EPA Region III and the Virginia State Water Control Board (1975) (as well as subsequent agreements).

In March 2013, EPA requested additional information from the Virginia Department of Conservation and Recreation (DCR) and provided comments on the draft permit. On March 28, 2013, EPA issued a time extension letter to increase the Agency's review time to 90 days, since we had reason to believe that the comments would not be addressed within the initial 30-day review period. EPA, DCR and the Virginia Department of Environmental Quality (DEQ) are currently in discussions on these issues. While EPA and DCR have agreed in principle on the resolution of several issues, one major issue remains -- clarification of the roles of Prince William County and the Virginia Department of Transportation (VDOT) in meeting the permit requirements. Since these discussions are ongoing and the 90-day review period will expire on May 28, 2013, EPA is issuing this specific objection to the issuance of the referenced permit pursuant to 40 C.F.R. §§ 123.44(b)(1) and (c)(1) and Section III.A.2 of the MOA. As further explained herein, EPA believes that the Prince William County permit fails to incorporate several substantive requirements for MS4 permits, as required by the federal Clean Water Act, 33 U.S.C. §§ 1251 *et seq.* (CWA), and its implementing regulations.

EPA's objection to the draft permit and identification of revisions that are needed before EPA can remove the objection, *see* 40 C.F.R. § 123.44(b)(2)(ii), are described below:

1. MS4 Permit Coverage

The current draft permit only applies to "discharges to surface waters from the Municipal Separate Storm Sewer System (MS4) owned or operated by the County of Prince

William”¹ (as well as two categories of co-mingled discharges). As written, the permit does not provide authorization for discharges of pollutants from property owned or operated by VDOT with that MS4. EPA believes this lack of NPDES permit coverage for VDOT in this draft permit is based on DCR’s assumption that VDOT’s discharges will be covered under the state’s General Permit for Discharges of Stormwater from Small Municipal Separate Storm Sewer Systems (MS4 GP) (to be effective July 1, 2013). However, as EPA noted in its March 26, 2013 letter withdrawing the Agency’s objection to the MS4 GP, and reiterated below, EPA has concerns that the terms and conditions of the general permit may not be sufficient to protect water quality or provide adequate authority for VDOT discharges in Prince William County.

In support of EPA’s concerns about the lack of adequate authorization for discharges from VDOT property located within Prince William County MS4, Agency regulations require MS4 permit coverage for all discharges from MS4s systems located in identified large and medium MS4s jurisdictions. *See* 40 C.F.R. § 122.26(a)(3)(i). The regulations provide several options for how those permits may be structured, including the issuance of “one system-wide permit covering all discharges from [MS4s] within a large or medium municipal storm sewer system” or by issuing “distinct permits for appropriate categories of discharges within a large or medium [MS4]”. *See* 40 C.F.R. § 122.26(a)(3)(ii). Further, the federal regulations specify that the definition of MS4 includes, *inter alia*, “roads with drainage systems” and “municipal streets” that are “[o]wned or operated by a State . . . or other public body.” 40 C.F.R. § 122.26(b)(8)(i-ii). This definition explicitly encompasses properties owned and operated by state departments of transportation such as those of VDOT in Prince William County.

Moreover, the Preamble to the EPA Phase I Rule for Stormwater Discharges supports the need for VDOT facilities within Prince William County to receive explicit coverage under that permit. In the Preamble, EPA explains that one purpose of the regulations is to resolve issues associated with MS4 dischargers not having the legal authority to implement land use controls (e.g., DOTs) or not having ownership of conveyances (e.g., localities in instances where DOTs own conveyances). *See* 55 Fed. Reg. 47990 (November 16, 1990). Further, from a policy perspective, requiring Phase I MS4 coverage for all VDOT-owned conveyances within Prince William County would minimize confusion over conveyance ownership since the Phase I permit would cover all such conveyances in the MS4.

In order to resolve this portion of our objection for the Prince William MS4 permit, as well as EPA’s concerns regarding VDOT authorization to discharge in the other ten Phase I MS4s in Virginia, EPA has offered Virginia the following options for extending Phase I MS4 permit coverage to VDOT facilities and conveyances located within Phase I MS4 jurisdictions:

1. DCR may issue VDOT 11 individual Phase I MS4 permits covering its activities including the discharge of pollutants within each traditional Phase I MS4 jurisdiction within the state;

¹ The Permit also applies to “Non-stormwater discharges and stormwater discharges associated with industrial activity (defined at 9 VAC 25-31-10) that are authorized by a separate Virginia Pollutant Discharge Elimination System (VPDES) permit; [and] [d]ischarges from construction activities that are regulated under the Virginia Stormwater Management Program (VSMP) (4VAC 50-60-10 et. seq.) and authorized by a separate VSMP Permit. . . .”

2. DCR may issue VDOT one individual Phase I MS4 permit covering its systems for all areas of the Commonwealth state-wide that are located within Phase I MS4 jurisdictions. Under this option, DCR would still need to issue separate Phase II MS4 General Permit coverage for VDOT conveyances outside Phase I jurisdictions;
3. DCR may deem VDOT a Phase I MS4 co-permittee along with the traditional municipality (e.g., County) in each of the Phase I jurisdictions. Under this option, DCR would still need to issue separate Phase II MS4 General Permit coverage for VDOT conveyances outside Phase I jurisdictions; or
4. DCR may issue one individual Phase I MS4 permit that covers all VDOT conveyances both within and outside Phase I jurisdictions.

Regardless of which option DCR chooses, any permit issued to VDOT must include provisions specific to its operations, including:

- Permit provisions which reflect the unique and distinct aspects of VDOT operations compared to traditional MS4 permittees;
- A requirement as to how localities and VDOT will plan, communicate and coordinate responsibilities (including funding, retrofit, and/or rebuilding projects) when county and VDOT systems are interconnected;
- An indication as to who is responsible (and thus liable for any violations) for reducing loads from areas draining to a VDOT stormwater conveyance system, given that VDOT owns and operates the system but the county has the authority to implement land use controls such as ordinances; and
- Permit provisions that are clear, equitable and enforceable, and that apply to the traditional MS4 as well as to VDOT (e.g., identify specific permit provisions that are applicable to one or more permittees or co-permittees) within the Phase I MS4.

As an aside, EPA notes that the issue of VDOT coverage did not arise during our agencies' discussions on the Arlington County Permit, given that Arlington County owns and operates the majority of roads within its borders. In contrast, VDOT owns and maintains the majority of roads in Prince William County.

If DCR prefers to resolve the objection to the Prince William MS4 permit without resolving the other Phase I VDOT coverage issues, EPA would also accept issuance of a separate individual permit for VDOT activities in Prince William MS4 (Option 1 above) or issuance of permit with VDOT "as a co-permittee with Prince William County" (Option 3).

2. Compliance with the Maximum Extent Practicable Standard

Municipal permittees are required to reduce the discharge of pollutants from their systems to the "maximum extent practicable" (MEP). See 33 U.S.C. § 1342(p)(B)(iii) ("Permits for discharges from municipal storm sewers . . . shall require controls to reduce the discharge of pollutants to the maximum extent practicable. . ."); see also 40 C.F.R. §122.34(a) ("Your NPDES MS4 permit will require at a minimum that you develop, implement, and enforce a storm water management program designed to reduce the discharge of pollutants from your MS4 to the maximum extent practicable (MEP), to protect water quality, and to satisfy the appropriate water quality requirements of the Clean Water Act.") Permitting authorities have the obligation to write permits with clear, enforceable and measurable provisions, and it is the responsibility of the permitting authority to develop appropriate requirements, including the determination of what

draft Prince William County permit because the fact sheet supporting the permit fails to evaluate whether the specific retrofit projects would be adequate and appropriate to require in order to satisfy the MEP standard.

In order to withdraw this portion of the objection, DCR must revise Part 1.B.2.(c) as follows:

“From the prioritized list of conceptual projects required in Part I.B.1, the permittee shall select at least seven conceptual projects for completion no later than 60 months after the effective date of this permit. The permittee shall submit a summary of the projects selected for implementation and proposed schedule and project status updates to the Department as part of the annual report, for the review and approval of the Department to ensure that the projects will reduce pollutants to the maximum extent practicable (MEP). The Department may request additional projects if the seven selected projects do not meet the MEP standard.

“The permittee shall submit a status of the selected projects and updated schedule for implementation to the Department with each annual report. The permittee may substitute alternative retrofit projects if opportunity exists provided that similar screening is applied to the substituted project as that in the watershed retrofit plans and that the alternative projects are also reviewed and approved by the Department.

“The permittee shall track the number of retrofit projects, type of land use being retrofitted, total acreage retrofitted and retrofit type by the watershed identified in the retrofit study and location by latitude and longitude in hours, minutes and seconds so that it is possible to calculate the pollutant reductions associated with the project.”

Similarly, the fact sheet must be revised to state:

“Part I.B.2.c) Retrofitting on Prior Developed Lands: As required in Part I.B.1 of the permit, the permittee must identify and prioritize those conceptual projects related to stormwater water pollutant reduction in order to work toward reducing pollutants to the maximum extent practicable (MEP). Based on the prioritized list, the permittee will select seven of these projects for implementation prior to expiration of the permit. The Department will review, provide comments, and/or approve the proposed projects for implementation to ensure that the projects will reduce pollutants to the MEP. The Department may request additional projects if the seven selected projects do not meet the MEP standard. After approval, the permittee will proceed with implementation of the projects such that they are completed prior to the expiration of the permit. In determining MEP, the Department will consider land use of area draining to proposed BMPs; pervious and impervious acreage; downstream receiving water and channel conditions; holistic benefits of retrofits, watershed improvement plans, and/or engineered structures; the estimated pollutant reductions; and cost of pollutant reductions. With each annual report, the permittee will provide a status update of those selected projects. The permit allows the permittee to substitute alternative projects if opportunity exists provided that similar screening is applied to the substituted project as that in the watershed retrofit plans and that the alternative projects are also reviewed and approved by the Department. After approval, the permittee will proceed with implementation of the projects such that they are completed prior to the expiration of the permit. With each annual report, the permittee will provide a status update of those selected projects. For each project, the permittee

will provide a status update of those selected projects. For each project, the permittee will track the number of retrofit projects, type of land use being retrofitted, total acreage retrofitted and retrofit type by the watershed identified in the retrofit study and location so that it is possible to calculate the pollutant reductions associated with the project."

EPA recommends that DCR make the retrofit provisions within the draft Prince William County permit comparable to the draft Phase I MS4 permit for Arlington County submitted to EPA on January 22, 2013. EPA is pleased that DCR has expressed a willingness to make the changes, and we look forward to reviewing a revised draft permit and fact sheet with these changes prior to withdrawing our objection.

3. Proper Maintenance

All NPDES permittees, including MS4 operators, are required to properly operate and maintain all facilities and systems of treatment and control at all times. *See* 40 C.F.R. § 122.41(e). EPA objects to the draft permit because, as written, it lacks provisions to ensure proper maintenance of stormwater management facilities. In order to resolve this portion of the objection, DCR must revise Part I.B.2.b)(5) and Part 1.B.2.i)(2)(a)(1) of the draft permit to read, "Should the permittee choose a strategy other than a maintenance agreement, such a strategy shall be provided in writing no later than 12 months after the effective date of this permit and ~~may~~ shall include periodic inspections, homeowner outreach and education, or other methods targeted at promoting the long term maintenance of such facilities." EPA is pleased that DCR has expressed a willingness to make the changes, and we look forward to reviewing a revised draft permit and fact sheet with these changes prior to withdrawing our objection.

4. Incorporation of Wasteload Allocations

Where the Commonwealth or EPA has established a Total Maximum Daily Load (TMDL) for an impaired water that includes wasteload allocations (WLAs) for stormwater discharges, permits must contain effluent limits and conditions consistent with the requirements and assumptions of the WLAs in the TMDL. *See* 40 C.F.R. §§ 122.44(d)(1)(vii)(B); 40 C.F.R. 123.44(c)(8). EPA objects to the draft Prince William County permit because it does not identify all applicable TMDLs currently in effect by name in the permit, including the date of establishment/approval, the pollutants and the applicable WLA (or summary of DCR's determination of what is considered consistent effluent controls and/or BMPs with the respective WLA). As a result, the draft permit does not contain requirements that are consistent with such applicable TMDLs.

In order to resolve this portion of EPA's objection, the permit must identify all applicable TMDLs. EPA is pleased that DCR has committed to develop a table with the necessary information for inclusion in the permit, and we look forward to reviewing a revised draft permit with this addition prior to withdrawing our objection.

EPA looks forward to continuing to work cooperatively with DCR and DEQ to resolve the remaining issues in an expeditious manner. EPA is currently in discussions with DCR, on other possible options, in addition to the four cited above to address our concerns about MS4 permit coverage and VDOT. Until the issues are resolved, however, DCR may not issue the Prince William County MS4 permit without written authorization from EPA. *See* 40 C.F.R. §122.4(c).

If you have any questions, please contact me, or Evelyn S. MacKnight, Chief, NPDES Permits Branch, at (215) 814-5717.

Sincerely,

A handwritten signature in black ink, appearing to read "Jon M. Capacasa". The signature is fluid and cursive, with a large initial "J" and "M".

Jon M. Capacasa, Director
Water Protection Division

cc: Ginny Snead, DCR
Melanie Davenport, DEQ
Marc Aveni, Prince William County